

Exhibit 11

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:
CITY OF NEW YORK)

PHILIP FLAX, being duly sworn, deposes and states:

1. I am the Section Chief and supervisory physical scientist in the United States Environmental Protection Agency, Region 2 ("EPA") Clean Air and Sustainability Division, Hazardous Waste Programs Branch in New York, entrusted with implementation Resource Conservation and Recovery Act ("RCRA") and associated regulations. EPA Region 2 has geographical jurisdiction for the implementation and enforcement of federal environmental laws in New York, New Jersey, Puerto Rico, and the U.S. Virgin Islands. I am providing this affidavit as part of the United States' response to the sentencing memoranda filed on behalf of Tonawanda Coke Corporation ("Tonawanda Coke") and Mark L. Kamholz.

2. I have been employed with the EPA for more than 24 years serving as a geologist, Corrective Action Project Manager, Senior Enforcement Specialist, Section Chief, and Senior Enforcement Team Leader. My experience includes the implementation of the RCRA statute and regulatory program by EPA, including the proper management and remediation of

hazardous waste sites and facilities. I graduated with a B.A. in geosciences from New Jersey City University and a M.A. in geology from Queens College, City University of New York.

3. In my position as Senior Enforcement Team Leader, I was responsible for supervising several RCRA civil inspectors in our efforts to ensure compliance with RCRA at regulated facilities. I first became familiar with Tonawanda Coke when one of the RCRA inspectors I supervised conducted an inspection at Tonawanda Coke. I also testified as an expert and rebuttal witness for the United States at the criminal trial for Tonawanda Coke and Mark Kamholz where I had the opportunity to review testimony of several witnesses and listen to testimony by government and defense witnesses.

Comments Regarding Sentencing Recommendations Related to RCRA Indictment

Counts 17, 18, and 19

4. I have reviewed the sentencing memoranda filed on behalf of Tonawanda Coke and Mark L. Kamholz and disagree with the assertions and/or conclusions of Tonawanda Coke's expert and civil attorney. In the memorandum for Tonawanda Coke, it is stated that an expert would be called to testify that "an evaluation of the available data regarding actual or potential environmental harm in this case does not indicate that the plant's management of decanter tank tar sludge made any significant contribution to any environmental harm at or around the plant." See Dkt. #229, p. 15. Additionally, the memorandum states that "in view of the extensive parallel administrative proceedings related to the issue of remediation of the coal field, and the area around the former Barrett Tank location, there is no need for this Court to enter a remedial order for the investigation and/or remediation of those areas as a special condition of probation in this case." See Dkt. # 229, p. 27.

5. Based upon my review of EPA's parallel administrative enforcement related to its June 2009 and September 2009 inspections, the trial testimony I observed, and the trial testimony I reviewed, there is insufficient information to indicate or support a conclusion that there was not any environmental harm caused by Tonawanda Coke's management of decanter tank tar sludge in the coal fields at this time or that additional remediation work is unnecessary.

Parallel Civil RCRA Enforcement Proceedings by EPA

6. EPA's parallel enforcement actions addressed the information obtained during joint inspections with New York State Department of Environmental Conservation ("NYS DEC") in June and September 2009. The enforcement by EPA did not include a full investigation of the coal fields and only addressed the violations documented by the EPA and NYS DEC in the inspections prior to the criminal search warrant and arrest of Mark Kamholz in December 2009.

7. EPA took action to specifically address Tonawanda Coke's illegal practice of mixing decanter tank tar sludge directly onto coal piles in the coal fields without a RCRA permit. EPA required Tonawanda Coke to properly recycle the material by using the concrete pad located in the coal field for such mixing purposes so that the decanter tank tar sludge would qualify for the exclusion from the definition of solid waste provided at 40 C.F.R. 261.4(a)(10).

8. Additionally, EPA required Tonawanda Coke to remediate the residues left on the ground that were hazardous wastes based on the toxicity characteristic for benzene associated with the failed decommissioning attempt of the Barrett Tanks. The area remediated around the Barrett Tanks was only a limited portion of the coal fields. In conducting the required remediation of the area around the Barrett Tanks, which did involve the removal of 18 times the amount of material originally estimated, EPA and NYSDEC allowed Tonawanda Coke, under

agency supervision, to manage these materials by using them as feedstock for the coke ovens, thereby saving Tonawanda Coke an incalculable amount in hazardous waste disposable costs.

9. Based on additional information that the United States discovered during the course of its criminal investigation (e.g., grand jury testimony and evidence obtained through a search warrant) that has become public through trial, it is not possible to reach a conclusion that there was no contribution to environmental harm at or around the plant. Tonawanda Coke's historical and extensive practice of mixing decanter tank tar sludge, as well as the residues from in and around the Barrett Tanks prior to EPA's enforcement actions, directly onto coal piles without any containment at various locations throughout the coal fields. There is no information available to suggest that the Tonawanda Coke's mixing activities directly on coal piles in the coal fields was limited to only the vicinity of the area EPA required Tonawanda Coke to remediate around the Barrett Tanks. This suggests that there may be additional contamination beyond the limited area remediated around the Barrett Tanks as required by the EPA.

Prior Contamination Studies by Tonawanda Coke

10. I also disagree with the statements contained in Exhibit 2 by Tonawanda Coke's civil attorney regarding the use of previous studies and the 2008 NYS DEC Record of Decision as support for no additional remedial work being necessary. Of most significance is that the date of the last monitoring or studies related to contamination at the Tonawanda Coke facility are dated 1992 as explained in the Exhibit. This is more than 20 years old and cannot be relied upon to reflect current conditions in and around the facility. There is evidence that additional contamination that occurred in the coal fields after 1992.

11. To determine whether there is any contamination present at the facility, current monitoring information needs to be collected. Even previous studies found chemicals associated

with coking operations present in the soil and groundwater. It is my opinion that existing studies are either significantly dated, in light of the duration of time during which Tonawanda Coke continued to release toxic substances into the environment, or are too limited in scope as to be able to conclude that no further action at Tonawanda Coke is warranted.

12. Furthermore, the position that a clay aquitard which underlies the shallow groundwater at the facility precludes migration of contaminated groundwater is a false premise. While the glacial clay layers are continuous in this area, they are prone to have permeable lens of sand that could act as a preferential conduit for lateral migration of contaminated groundwater.

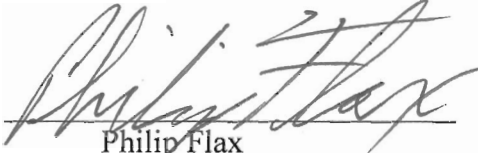
13. While some potential contamination in the coal fields may have been contributed by prior owners of the facility, Tonawanda Coke's extensive history of mixing decanter tank tar sludge on the coal piles in the coal fields still factors into any potential contamination found in the coal fields. In order to determine whether the coal fields have been contaminated beyond the areas remediated around the Barrett Tanks, an investigation to determine whether there was environmental harm at and/or around the facility would be necessary.

Conclusion

14. In my opinion, I believe there is enough information to support the recommendation by the United States that further investigation of potential contamination in the coal fields should be required to make this determination. I believe that only a complete RCRA Facility Investigation (RFI) type study of the Tonawanda Coke's facility and environs will be able to accurately and adequately determine whether or not the facility and the area around it require remediation, and how much. This investigation would properly define the lateral and vertical nature and extent of contamination to soil, sediment, surface water and groundwater from TCC's activities. If it is determined that significant contamination exists, then a thorough

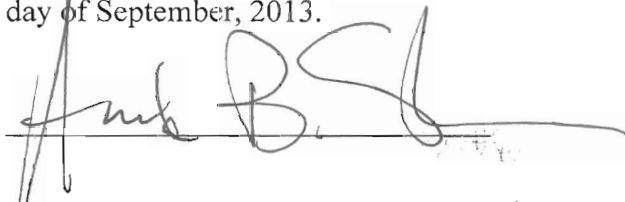
Corrective Measures Study (CMS) followed by implementation of selected remedies (CMI) should be performed, all overseen by the regulatory agencies.

DATED: New York, New York, September 30, 2013.



Philip Flax

Sworn to before me this 30th
day of September, 2013.



Notary Public, State of New York
Qualified in New York County
My Commission Expires 11/5/13

AMANDA B. STULMAN
Notary Public-State of New York
No. 02ST6066061
Qualified in New York County
My Commission Expires Nov. 5, 2013